Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FILIBERTO E. MONTOYA
and ROSARIO MONTOYA,

Petitioners,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the decision to prosecute an immunized witness based solely on the content of that witness' immunized testimony violates the Fifth Amendment to the Constitution, Kastigar v. United States, 406 U.S. 441 (1972), and 18 U.S.C. § 6002.

Whether the decision to prosecute an immunized witness and his wife based solely on the content of this witness' immunized testimony is vindictive prosecution in violation of the Due Process Clause of the Fifth Amendment.

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The Petitioners, Filiberto E. Montoya and Rosario Montoya, respectfully pray that a writ of certiorari issue to review the judgment of the United

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States Court of Appeals for the Ninth Circuit entered on May 13, 1995.

I.

THE OPINION BELOW

This Petition for Certiorari is from the published opinion by the Ninth Circuit Court of Appeals in United States v. Montoya, 45 F.3d 1286 (9th Cir. 1995) ("the Opinion"). A true and correct copy of the Opinion is attached hereto as Appendix A.

On May 13, 1995, the Ninth Circuit Court of Appeals denied a petition for rehearing of this case, with Senior Circuit Judge Bright voting for rehearing, and denied petitioners' suggestion for rehearing en banc, with Senior Circuit Judge Bright recommending en banc review. A true and correct copy of that order is attached hereto as Appendix B.

II.

JURISDICTION OF THIS COURT

On January 12, 1995, the Ninth Circuit Court of Appeals entered the Opinion, with a dissent by Senior Circuit Judge Bright, affirming the convictions of

Rosario Montoya and Filiberto E. Montoya. (Appendix A.) On May 13, 1995, the Ninth Circuit Court of Appeals denied the petition for rehearing, with Senior Circuit Judge Bright voting for rehearing, and denied the suggestion for rehearing en banc, with Senior Circuit Judge Bright recommending en banc review. (Appendix B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . .

Title 18, U.S.C. § 6002:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or

provide other information in a proceeding before or ancillary to

(1) a court or grand jury of the United States;

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a sub-committee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except in a prosecution for perjury, giving a false statement, or

otherwise failing to comply with the order.

IV.

STATEMENT OF THE CASE

A. The Facts

In the fall of 1988, Assistant United States Attorney ("AUSA") Reese, who was participating in investigations of money laundering in San Diego County and similar crimes in Oklahoma, was contacted by an attorney on behalf of Petitioner FILIBERTO E. MONTOYA ("Mr. Montoya"). AUSA Reese wrote a letter granting Mr. Montoya informal immunity and interviewed him in November, 1988, and January, February and May, 1989. Based on those discussions, AUSA Reese decided to call Mr. Montoya as a witness. Mr. Montoya was granted court ordered immunity, 18 U.S.C. § 6002, and he testified before the grand jury in San Diego in January, 1989, and at the Oklahoma trial in May 1989. (The Opinion at 1298.)

In February, 1990, AUSA Reese prepared a Memorandum to the United States Attorney requesting that authority be sought from the Department of Justice

to prosecute Mr. Montoya for the very acts about which he had testified. AUSA Reese explained that Mr. Montoya "appeared to testify falsely . . ." and "[was] also believed to have testified falsely during a trial (although a perjury prosecution could not be sustained) . . . ." After review of AUSA Reese's Memorandum by the United States Attorney and the Department of Justice, permission to prosecute was granted by the United States Attorney General. (The Opinion at 1290.)

Mr. Montoya's immunized testimony was therefore used three times by the government: (1) by AUSA Reese in deciding to initiate prosecution of Mr. Montoya and his wife; (2) by the United States Attorney in seeking permission to prosecute Mr. Montoya and his wife, and; (3) by the United States Attorney General in granting permission to prosecute Mr. Montoya and his wife. In the Opinion, the Dissent believed those "uses" violated the Fifth Amendment, Kastigar v. United States 406 U.S. 441 (1972), and

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18 U.S.C. § 6002. (The Opinion at 1301-03, J. Bright dissenting.) (Citations omitted.)

B. The Opinion

In the Opinion, the Ninth Circuit Court of Appeals, over the dissent of Senior Circuit Judge Bright, held, in part, it did not violate the Fifth Amendment privilege against self-incrimination, 18 U.S.C. § 6002, or Kastigar v. United States, 406 U.S. 441 (1972) for the government to use a review of Mr. Montoya's immunized testimony and nothing more in deciding whether Mr. Montoya should be prosecuted. Senior Circuit Judge Bright dissented because the "decision to initiate prosecution of an immunized witness may be considered non-evidentiary use of immunized testimony." (The Opinion at 1301, J. Bright, dissenting.) (Citation omitted.)

The Opinion also held that the Montoyas failed to prove "an improper prosecutorial motive through objective evidence" to allow a presumption of vindictive prosecution, and thus concluded the presumption of vindictiveness did not arise. (The Opinion at 1299.)

Senior Circuit Judge Bright dissented, and found there was a presumption of vindictiveness because the government "did not have enough proof to proceed with perjury charges" and "decided to punish Mr. Montoya with using the information the Government always had to prosecute him, and then, for extra measure, proceeding to recommend prosecution of Mrs. Montoya." (The Opinion at 1303, J. Bright, dissenting.)

Senior Circuit Judge Bright noted further,

> the Government should have prosecuted Montoya initially, rather than granting him immunity. [The Government], however, resorted to subterfuge. If Montoya lied, [the Government], under the statute, could have initiated the prosecution for perjury. Instead, [the Government] turned Montoya's Fifth Amendment privilege against self-incrimination on its head, concluding that Montoya lied and [the Government] proceeded on a course to "fix" him.

Senior Circuit Judge Bright would therefore have reversed the convictions based on the government's vindictiveness. (The Opinion at 1303, J. Bright, dissenting.)

V.

THIS PETITION FOR CERTIORARI SHOULD BE GRANTED

A. The Opinion Creates A Split In The Circuits By Allowing The Government To Use Immunized Testimony To Decide To Prosecute An Immunized Witness

The Opinion creates a split with the Eight Circuit, which noted in United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973), that Kastigar v. United States, 406 U.S. 441 (1972) and the Fifth Amendment prohibits "all prosecutorial use of [immunized] testimony, not merely that which results in the presentation of evidence before the jury." Id. at 311. McDaniel, noted further, "[s]uch [non-evidentiary] use could conceivably include . . . deciding to initiate prosecution . . . ." Id. at 311.

The Opinion also creates a split with the Eleventh Circuit, which noted in United States v. Byrd, 765 F.2d 1524, 1530 (11th Cir. 1985), that Kastigar "made no mention of any burden on the Government to erect an impenetrable barrier between the prosecutors who hear or read the immunized testimony and those who decide to indict, even though the potential problem was an obvious one." (Emphasis added.) According to Byrd, "[a]t a minimum, the existence of independent evidence sufficient to establish probable cause to indict must be deemed to raise a presumption that the decision to indict was not tainted." Id. at 1530-31. (Emphasis added.) The Ninth Circuit in contrast, now allows the prosecution to taint the decision to indict by using immunized testimony in deciding whether that witness should be prosecuted.

There is also a split among the circuit courts of appeal on "whether Kastigar permits . . . 'non-evidentiary use of immunized testimony.'" See, United States v. Harris, 973 F.2d 333, 337 n.2 (4th Cir. 1992) (government may not alter

investigative strategy as a result of immunized statement); United States v. North, 910 F.2d 843, 856-60 (D.C.Cir.) (discussion of non-evidentiary use of immunized testimony), modified in part, 920 F.2d 940 (1990), cert. denied, 500 U.S. 941 (1991).

Also completely at odds with the Opinion is the United States Court of Military Appeals. In United States v. Olivero, 39 M.J. 246 (C.M.A. 1994), the United States Court of Military Appeals held, in a case almost identical to the one at bar, that Kastigar prohibits "using" immunized testimony to decide to prosecute the immunized witness and that a decision to prosecute based on immunized testimony violates Kastigar. Id. The holding of the United States Court of Military Appeals in Olivero has been repeated in United States v. Corcoran, 40 M.J.A. 478 (C.M.A. 1994) and United States v. McGeeney, 41 M.J.A. 544 (C.M.A. 1994).

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B. This Case Presents An Important Question Concerning The Scope Of This Court's Holding In Kastigar

The phrase "non-evidentiary use" never appears in Kastigar, where the Supreme Court simply held that the Fifth Amendment "prohibits the prosecutorial authorities from using the compelled testimony in any respect and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453. (Emphasis in original.) The plain meaning of "any" (emphasized by the Supreme Court) precludes what the Ninth Circuit now allows: A decision whether a witness should be prosecuted may be based solely on what the witness said while immunized.

The Supreme Court in Kastigar also noted the "total prohibition on use" of immunized testimony bars the "use" of that testimony as an "'investigatorial lead,' and also bar[s] the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." Kastigar at 460. (Citation

omitted.) Despite this explicit prohibition, United States v. Montoya now stands for the proposition that the government may use "immunized testimony as an investigatory lead in deciding to initiate prosecution . . . ." (Opinion at 1301, J. Bright dissenting.)

The Supreme Court in Kastigar noted further an immunity statute violates the Fifth Amendment if it "failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony." Kastigar, 406 U.S. at 454, quoting Ullman v. United States, 350 U.S. 422, 437 (1956), (emphasis added by the Supreme Court in Kastigar). Because of the Opinion, § 6002 now violates the Fifth Amendment by failing to protect Mr. Montoya from prosecution based on the government's knowledge of what he said while immunized.

The Supreme Court has repeatedly held immunized testimony cannot be "used" in any way: Murphy v. Waterfront Commission of New York, 378 U.S. 52, 79 (1964) ("cannot be used in any manner");

Nix v. Williams, 467 U.S. 431, 442 (1984) (the Fifth and Sixth Amendments prohibit evidence that is discovered as "the fruit of unlawful police conduct . . . ."); Kastigar, supra, at 461 (". . . the compelled testimony can in no way lead to the infliction of criminal penalties."). Yet, the Ninth Circuit now allows immunized testimony to be used in deciding whether an individual should be prosecuted. (The Opinion at 1297.)

The proper application of Kastigar to the decision to prosecute is of critical importance. Even the Department of Justice could not have predicted the radical change the Opinion has made to Fifth Amendment law; the portion of McDaniel forbidding an indictment based on a review of immunized testimony is quoted in the United States Attorneys' Manual. United States Attorneys' Manual, Title 9, Section 23.400 (1990). The United States Attorneys' Manual also states before an immunized witness may be prosecuted, "the Government will also have to show that it has made no 'non-evidentiary' use of testimony or its fruits, such as a decision to focus on the witness

as a potential defendant." Id. at 9-23.330. (Emphasis added.)

The Opinion thus changes the assumptions of prosecutors and defense attorneys in the Ninth Circuit about the risks present in testifying under a grant of immunity. Because of the Opinion, hundreds of new prosecutions may result in the Ninth Circuit as prosecutors realize they have free reign to immunize witnesses before the grand jury, and then to make their decision to prosecute based on their firsthand, private, under oath interview of that potential defendant. The Opinion thus drastically alters the nature of the representation and prosecution of grand jury witnesses. It is such an aberrant departure from previous case law that it is a de facto reversal of Kastigar and § 6002, and this petition for certiorari should be granted.

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C. The Opinion Sets A Dangerous Precedent When It Allows The Government To Punish Mr. Montoya And, "For Extra Measure," Mrs. Montoya Based On Evidence That Could Not Be Used To Prosecute Him For Perjury

The Opinion concludes, without analysis, that "the presumption of vindictiveness did not arise in this case" (citations omitted). As noted by the Dissent, the government "did not have enough proof to proceed with perjury charges so [it] obviously decided to punish Mr. Montoya with using the information the government always had to prosecute him, and then, for extra measure, proceeding to recommend prosecution of Mrs. Montoya." (The Opinion at 1303, J. Bright, dissenting.) As noted by the Dissent, "the evidence in the record indicates a realistic likelihood of personal pique and personal frustration which gives rise to a presumption of prosecutorial vindictiveness." Id.

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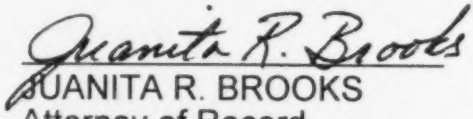
VI.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DATED: May 30, 1995 McKENNA & CUNEO



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